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No. 70-330

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIE JAMES THARPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1971, and the petition for a writ of certiorari was filed on June 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial judge committed reversible error in excluding testimony, proffered by petitioner in an effort to establish a defense of entrapment, of his conversations with an individual involved in the government's investigation who did not testify at petitioner's trial.

STATEMENT

After a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted on three counts charging removal, possession, and transportation of non-taxpaid distilled liquor, in violation of 26 U.S.C. 5601(a)(12), 5205(a)(2), and 5604(a)(1). He was sentenced to concurrent two-year terms of imprisonment on two counts, and to five years' probation on the third count, beginning after his release from prison. The court of appeals affirmed *per curiam* (Pet. App.).

On April 24, 1970, Agent Stokes of the Alcohol, Tobacco and Firearms Division of the Treasury Department went to petitioner's grocery store in North Wilkesboro, North Carolina (Tr. 22). Stokes had not met petitioner before, and told him that "Sammie had sent me" (Tr. 27). Stokes sought to purchase from petitioner some non-taxpaid whiskey; he discussed with petitioner the frequency of the police patrols in the area, and the price for the liquor. Petitioner then sold Stokes 30 cases of non-taxpaid liquor at $25.00 a case (Tr. 23-25). Before Stokes left, petitioner said he was available when Stokes wanted more liquor (Tr. 25).

Stokes had no further contact with petitioner until May 27, 1970. On that date he called petitioner, identified himself as the "individual that had been up there earlier", and offered to purchase 300 gallons of whiskey. Pursuant to petitioner's instructions, Stokes called back later that same evening and discussed the quality and price of the liquor (Tr. 8-9). Because of petitioner's earlier warning about the danger of hauling whiskey on weekends due to increased police patrols, Stokes expressed a desire to pick up the liquor on a Thursday night. Stokes rented a truck and, on the evening of Thursday, May 28, 1970, drove to petitioner's grocery store. According to Stokes, petitioner suggested that Stokes sample some of the liquor located in petitioner's truck outside the store because petitioner wanted to do business with Stokes in the future. Petitioner then left Stokes at the store and drove Stokes' truck to a farm where he picked up the liquor. Upon petitioner's return, Stokes inspected the whiskey in his truck and then signalled other investigators, stationed nearby, to assist in petitioner's arrest (Tr. 11-16, 71-72). Petitioner's arrest and conviction were based solely on the May 28th sale.

Petitioner based his defense on entrapment. He testified that he had first met Stokes, alias Bill Ingram, at his supermarket in Hays, North Carolina, in January, 1970, and that at about the same time federal and state authorities had begun audits of petitioner's taxes. He said that Stokes had introduced himself as "Sammie's friend" and declared a need for high quality nontaxpaid liquor (Tr. 37-38, 40-41, 72). "Sammie" was one Sammie Weatherman, who

lived near petitioner's supermarket. Weatherman had traded with petitioner on an almost daily basis from the summer of 1969 to April 24, 1970, the date of petitioner's first sale to Stokes (Tr. 38, 42, 49).

According to petitioner, he initially told Stokes that he was not involved in the liquor business. Weatherman and Stokes each telephoned him 6 to 8 times between January and April, 1970, to inquire if petitioner would supply some non-taxpaid liquor (Tr. 47). During one of these calls Stokes identified himself as "Sammie's friend" and asked petitioner to "fix him up" with liquor (Tr. 43-44, 53). In February or March, 1970, petitioner ceased denying his involvement in the illegal whiskey business and told Stokes that he was uncertain whether or not he could help him acquire whiskey (Tr. 47, 44). When petitioner finally decided, in April 1970, to sell Stokes the liquor, his decision was due, in part, to his need for money to pay federal and state tax assessments, and to Stokes' offer to increase the price of the liquor from $23.00 per case to $25.00 per case (Tr. 46-47, 56).

Petitioner sought to buttress his entrapment defense by direct testimony concerning conversations he purportedly had had with Weatherman. Petitioner contended that Weatherman worked for the government and, with Stokes, actively induced petitioner to sell Stokes non-taxpaid liquor (Tr. 38-40, 64-66). Weatherman did not testify at trial. The trial judge found no evidence linking Weatherman with the government and declined to permit any testimony as to what petitioner was told by Weatherman (Tr. 38-41, 43, 45, 47).

Petitioner was permitted, however, to testify about his conversations out of the jury's presence. He said that Weatherman approached him in the summer of 1969 and spoke of his "uncle"—purportedly Stokes—who was in the restaurant business in Georgia and who "bootlegged on the side" (Tr. 38, 64-65). He saw Weatherman almost daily and persistently was asked by him to sell or locate some whiskey for Stokes (Tr. 65). Until April, when he agreed to sell Stokes liquor, petitioner resisted Weatherman's overtures and disclaimed involvement in the liquor business (Tr. 65-66). Finally, on April 23, 1970, petitioner agreed to sell Stokes some liquor; on the afternoon of April 24th, Weatherman visited petitioner to assure that arrangements for the transaction were completed (Tr. 65-66). After the initial sale to Stokes, petitioner did not see Weatherman again (Tr. 66).

The court of appeals held that, while the trial judge erred in excluding petitioner's testimony of his conversations with Weatherman, this was not reversible error. Because of the time lapse between the allegedly induced sale on April 24th and the May 28th sale charged in the indictment, the absence of any urging as to the May sale, and petitioner's admission that he made the sale in part because he needed money, the court concluded that the May transaction "was no more than a solicitation which gave Tharpe the opportunity to commit a crime." Thus, "even with the excluded testimony Thorpe failed as a matter of law to establish that he was entrapped." (Pet. App. 3A, 2A.)

ARGUMENT

The court of appeals correctly concluded that the exclusion of petitioner's testimony concerning his alleged conversations with Weatherman was not reversible error. As explained by that court, even with the excluded testimony, the evidence showed—as a matter of law—that Stokes' action in May—more than a month after the earlier sale in April and without any contact in the interim—had been a mere "solicitation," and thus did not "create" petitioner's criminal conduct (Pet. App. 2A).

Moreover, the excluded testimony was substantially the same as testimony already before the jury, indicating that Stokes and Weatherman had been working together and that Weatherman and Stokes had each spoken to petitioner on numerous occasions requesting him to supply non-taxpaid whiskey (Tr. 22, 28, 40, 47). The jury also had before it petitioner's testimony denying involvement with any illicit liquor business until April, when his need for money influenced him to sell Stokes some non-taxpaid liquor (Tr. 40-41, 44, 46-48, 56).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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